Resolution Alliance Sdn Bhd v Binabaik Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–2654–11 OF 2012
MOHD HISHAMUDIN, HAMID SULTAN AND UMI KALTHUM JJCA
28 NOVEMBER 2014

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Civil Procedure — Appeal — Appeal against decision of High Court — Parties entered into sale and purchase agreement — Execution of deed of assignment — Declaration of right over property — Counterclaim for payment of service and maintenance charges — Whether plaintiff liable to pay outstanding maintenance charges claimed — Whether warranted consequential order for delivery of strata title to property

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This was an appeal against the decision of the High Court in dismissing the appellant's ('the plaintiff') originating summons application against the respondents ('the defendants') for a declaration of its right over a property, and had instead allowed the first respondent's counterclaim against the appellant for the payment of service and maintenance charges. The second defendant entered into a sale and purchase agreement with the first defendant, a developer, for the purchase of a property. In order to finance the purchase, the second defendant took a loan from Malayan Banking Bhd (MBB) by entering into a loan agreement as well as executing a deed of assignment ('the assignment') in favour of MBB. The first defendant gave its consent to the assignment and gave a further written undertaking to execute the memorandum of transfer of the property to the second defendant and to deliver the issue document of title in respect of the property to MBB free from encumbrances upon its issuance, once the Land Office had issued the title ('the undertaking'). MBB disbursed the loan in full to the first defendant. Some eight years later, the first defendant, informed MBB that the strata title for the property had been issued. The first defendant also informed MBB that it would only release the title to the property to MBB upon MBB making full payment of the outstanding maintenance charges, namely, the sum of RM27,835.25 due to the first defendant in respect of the property. The loan and the assignment were subsequently transferred to, and vested in, the plaintiff under s 50 of the Banking and Financial Institutions Act 1989 and pursuant to a High Court Vesting Order ('the vesting order'). Two years later, the second defendant was adjudicated a bankrupt. Around the same time, the second defendant defaulted on the loan. This led to the plaintiff exercising its rights under the vesting order and the assignment. The plaintiff proceeded to auction the property. The property was successfully sold at the auction to one Chan Ching Ai for RM113,000. The plaintiff wrote to the first defendant for the release of the strata title in respect of the property to the plaintiff to enable the plaintiff to

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effect the transfer of the property to the successful bidder but the first defendant informed the plaintiff that it would only release the strata title to the plaintiff upon the plaintiff settling the outstanding maintenance charges on the property in the sum of RM27,835.25. The first defendant did execute the memorandum of transfer (Form 14A of the National Land Code) in favour of the second defendant and released the memorandum of transfer to the plaintiff. The plaintiff filed the originating summons in the High Court for a declaration that the plaintiff was not liable to pay the outstanding maintenance charges claimed by the first defendant in respect of the property, and for a consequential order for the delivery of the strata title to the property by the first defendant to the plaintiff.

Held, allowing the appeal with costs:

(1) Section 5.01 was of no relevance at all. Although the words 'other outgoings' in section 6.02 would include maintenance charges, the section only conferred on the plaintiff the right to utilise the proceeds of the sale of the property for paying the maintenance charges: it did not impose on the plaintiff the obligation to do so. The High Court judge had erred in his decision. Under the assignment the liability to pay any maintenance charges still remained with the second defendant. Section 3.01 of the assignment stated that the second defendant as the purchaser cum assignor assigns to MBB 'all the present and future right title and interest and benefit of the assignor in and to the property'. This means that what have been assigned to the plaintiff were only the 'right title interest and benefit' in respect of the property. There has been no assignment of the liabilities in respect of the property to the plaintiff (see paras 29 & 31).

(2) Clause 3(2) of the sale and purchase agreement must be read with cl 3(3) of the same. Under cl 3(3) the right of the purchaser under the sale and purchase agreement, in particular cl 3(2), was to have the title to the property passed on to the purchaser upon payment of the full purchase price. Clause 3(3) did not make it a condition that the purchaser must first settle any maintenance charges due before the purchaser is entitled to have the title transferred to her. This right of the purchaser under cl 3(3) to have the title transferred to her was transferred on to MBB by reason of section 3.01 of the assignment (see para 32).

(3) In an assignment of a contract, it is an accepted principle that the burden or liability cannot be transferred so as to discharge the original contractor without the consent of the other party because no one is obliged without his consent to accept the liability of a person other than him with whom he made his contract (see para 33).

(4) The words 'right, interest and title' in the said property were never intended to include the liability of the purchaser. First, if it was the

intention of the assignor to pass his liability under the agreement to the plaintiff, the solicitors would have included the word 'liability' without much fuss or difficulty. In fact, the express mention of the aforesaid words show a clear intention to exclude the assignor's liability under the agreement. The refusal by the first defendant to deliver up the strata title to the plaintiff amounts to a breach of the former's undertaking given pursuant to its consent to the assignment. The first defendant had given its undertaking to execute all necessary instruments and agreements and to obtain the necessary consent to transfer the property to the second defendant and to deliver the issue document of title to the property free from all encumbrances to MBB upon issuance of the same (see paras 38 & 33).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana menolak permohonan saman pemula perayu ('plaintif') terhadap responden-responden ('defendan-defendan') kerana deklarasi tentang haknya ke atas satu hartanah, dan sebaliknya membenarkan tuntutan balas responden pertama terhadap perayu untuk bayaran perkhidmatan dan caj penyelenggaraan. Defendan kedua telah memasuki perjanjian jual beli dengan defendan pertama, seorang pemaju, untuk belian suatu hartanah. Bagi tujuan membiayai belian itu, defendan kedua telah mengambil pinjaman daripada Malayan Banking Berhad ('MBB') dengan memasuki perjanjian pinjaman dan juga memasuki surat ikatan penyerahhakan ('penyerahhakan itu') menyebelahi MBB. Defendan pertama telah memberi persetujuannya untuk penyerahhakan itu dan selanjutnya memberi akujanji bertulis untuk melaksanakan memorandum pindah milik hartanah itu kepada defendan kedua dan untuk menyerahkan dokumen hak milik keluaran berkaitan hartanah itu kepada MBB bebas daripada sekatan selepas keluarannya, setelah Pejabat Tanah telah mengeluarkan hak milik ('aku janji itu') MBB telah membayar pinjaman sepenuhnya kepada defendan pertama. Lebih kurang lapan tahun kemudian, defendan pertama, memberitahu MBB bahawa hak milik strata untuk hartanah itu telah dikeluarkan. Defendan pertama juga memberitahu MBB bahawa ia hanya akan melepaskan hak milik hartanah itu kepada MBB apabila MBB membuat bayaran penuh untuk baki caj penyelenggaraan, iaitu sejumlah RM27,835.25 yang kena dibayar kepada defendan pertama berkaitan hartanah itu. Pinjaman dan penyerahhakan itu kemudiannya telah dipindah milik kepada, dan diberikan kepada, plaintif di bawah s 50 Akta Perbankan dan Institusi Kewangan 1989 dan menurut Perintah Pemberian Mahkamah Tinggi ('perintah pemberian'). Dua tahun kemudian, defendan kedua telah dijadikan seorang bankrap. Sekitar masa yang sama, defendan kedua telah gagal membayar pinjaman itu. Ini membawa kepada plaintif menggunakan haknya di bawa perintah pemberian dan penyerahkan itu. Plaintif seterusnya telah melelong hartanah itu. Hartanah itu telah berjaya dijual di lelongan itu kepada Chan Ching Ai untuk RM113,000. Plaintif telah menulis kepada defendan

pertama untuk melepaskan hak milik strata berkenaan hartanah itu kepada plaintif bagi membolehkan plaintif melakukan pindah milik hartanah itu kepada pembida berjaya itu tetapi defendan pertama memberitahu plaintif bahawa ia hanya akan melepaskan hak milik strata itu kepada plaintif setelah plaintif menyelesaikan baki caj penyelenggaraan ke atas hartanah itu yang berjumlah RM27,835.25. Defendan pertama telah memasuki memorandum pindah milik (Borang 14A Kanun Tanah Negara) menyebelahi defendan kedua dan melepaskan memorandum pindah milik kepada plaintif. Plaintif telah memfailkan saman pemula di Mahkamah Tinggi untuk deklarasi bahawa plaintif tidak bertanggungjawab membayar baki caj penyelenggaraan yang dituntut oleh defendan pertama berkenaan hartanah itu, dan untuk perintah berikutnya bagi serahan hak milik strata kepada hartanah itu oleh defendan pertama kepada plaintif.

Diputuskan, membenarkan rayuan dengan kos:

(1) Seksyen 5.01 tidak relevan langsung. Walaupun perkataan 'other outgoings' dalam seksyen 6.02 termasuk caj penyelenggaraan, seksyen itu hanya memberikan plaintif hak untuk menggunakan hasil jualan hartanah itu untuk membayar caj penyelenggaraan: ia tidak meletakkan tanggungjawab plaintif untuk berbuat demikian. Hakim Mahkamah Tinggi terkhilad dalam keputusan beliau. Di bawah penyerahkan liabiliti untuk membayar apa-apa caj penyelenggaraan masih terletak pada defendan kedua. Seksyen 3.01 penyerahhakan itu menyatakan bahawa defendan kedua sebagai pembeli dan juga penyerah hak menyerah hak kepada MBB 'all the present and future right title and interest and benefit of the assignor in and to the property'. Ini bermaksud bahawa apa yang diberikan kepada plaintif hanyalah 'right title interest and benefit' berkaitan hartanah itu. Tiada penyerahhakan liabiliti berkaitan hartanah itu kepada plaintif (lihat perenggan 29 & 31).

(2) Fasal 3(2) perjanjian jual beli hendaklah dibaca bersama fasal 3(3) yang sama. Di bawah fasal 3(3) hak pembeli di bawah perjanjian jual beli, khususnya di bawah fasal 3(2), adalah agar hak milik hartanah itu dipindahkan kepada pembeli selepas bayaran harga belian sepenuhnya. Fasal 3(3) tidak menjadikannya satu syarat supaya pembeli perlu menyelesaikan apa-apa caj penyelenggaraan yang kena dibayar sebelum pembeli itu berhak mendapat hak milik itu dipindahkan kepadanya. Hak pembeli ini di bawah fasal 3(3) agar hak milik dipindahkan kepadanya telah dipindahkan kepada MBB oleh sebab seksyen 3.01 penyerahhakan itu (lihat perenggan 32).

(3) Dalam penyerahhakan suatu kontrak, ia adalah prinsip yang diterima bahawa beban atau liabiliti tidak boleh dipindahkan untuk melepaskan kontraktor asal tanpa persetujuan pihak lain kerana tiada sesiapa diwajibkan tanpa persetujuannya untuk menerima liabiliti seseorang

selain daripada orang yang dia telah membuat kontraknya itu (lihat perenggan 33).

(4) Perkataan-perkataan 'right, interest and title' dalam hartanah itu tidak pernah bertujuan untuk memasukkan liabiliti pembeli. Pertama, jika ia adalah niat penyerah hak untuk memindahkan liabilitinya di bawah perjanjian kepada plaintif, peguam cara sepatutnya memasukkan perkataan 'liability' tanpa banyak masalah atau kesukaran. Bahkan, perkataan-perkataan yang dinyatakan dengan jelas itu menunjukkan niat yang jelas untuk tidak memasukkan liabiliti penyerah hak di bawah perjanjian itu. Keengganan oleh defendan pertama untuk menyerahkan hak milik strata kepada plaintif adalah satu pelanggaran akujanji plaintif yang telah diberikan berikutan persetujuannya terhadap penyerahhakan itu. Defendan pertama telah memberikan akujanjinya untuk melaksanakan semua suratcara dan perjanjian dan untuk memperoleh persetujuan yang perlu bagi memindahkan hartanah itu kepada defendan kedua dan untuk menyerahkan dokumen hak milik keluaran ke atas hartanah itu bebas daripada apa-apa sekatan kepada MBB selepas keluaran yang sama (lihat perenggan 38 & 33).]

Notes

For cases on appeal against judgment of the High Court, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 871–879.

Cases referred to

Chua Hee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480; [1990] 1 CLJ (Rep) 49, SC (refd)

Chung Khiaw Bank Ltd v Penang Garden Sdn Bhd [1990] 1 CLJ (Rep) 748, HC (refd)

Director General of Inland Revenue v Ooi Guan Hoe [1986] 2 MLJ 385 (refd)

Hong Leong Bank Berhad (which has taken over all assets and liabilities of Hong Leong Finance Bhd) v Sum-Projects (Bros) Sdn Bhd [2010] 7 MLJ 39, HC (refd)

Hong Leong Bank Bhd v Tan Siew Nam & Anor [2014] 5 MLJ 34; [2014] 1 LNS 458, CA (refd)

Legislation referred to

National Land Code Form 14A
Strata Titles Act 1985 s 40A
Banking and Financial Institutions Act 1989 s 50

Appeal from: Originating Summons No 24F-16–01/2012 (High Court, Johor Bahru)

Jack Yow (Vincy Wong with him) (Rahmat Lim & Partners) for the appellant.

Chen Wai Jun (WJ Chen & Co) for the first defendant.
Rosli Ahmad (Senior Federal Counsel, Jabatan Insolvensi Malaysia) for the second defendant.

Mohd Hishamudin JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is against the decision of the High Court of Johor Bahru of 6 August 2012.

[2] On 6 August 2012, the High Court of Johor Bahru had dismissed the appellant's originating summons application against the respondents for a declaration of its right over a property, and had instead allowed the first respondent's counterclaim against the appellant for the payment of service and maintenance charges.

[3] At the High Court proceedings, the appellant (Resolution Alliance) was the plaintiff; whilst the first and second respondents were the first and second defendants, respectively. Thus in this judgment we will be referring to the appellant as the plaintiff, to the first respondent (Binabaik) as the first defendant, and to the second respondent (Suryati) as the second defendant.

[4] The plaintiff had filed the originating summons in the High Court for:

(a) a declaration that the plaintiff, as the assignee under an assignment dated 13 December 1999, in respect of a sale and purchase agreement of a strata title property dated 17 July 1999, is not liable to the first defendant for the payment of a sum of RM27,835.25, being service and maintenance charges ('maintenance charges') in respect of the said property;

(b) an order that the first defendant (Binabaik) do deliver to the plaintiff (Resolution Alliance) the issued document of title of a strata title in respect of a unit, namely, Unit No 10–05, Block M2, in an apartment known as Mewah View Luxurious Apartment at Taman Bukit Mewah in Johor Bahru ('the property'); and

(c) an order that the second defendant (Suryati) do execute the memorandum of transfer in favour of the plaintiff in respect of the property within seven days of the service of the memorandum of transfer (in default, the transfer to be effected by the registrar of the High Court).

[5] On 6 August 2014, after hearing submissions, we reserved judgment.

[6] We shall now deliver our unanimous decision. A

[7] We are allowing the plaintiff's appeal with costs.

[8] Our reasons are as follows. B

BRIEF BACKGROUND FACTS

[9] On 17 July 1999 the second defendant entered into a sale and purchase agreement with the first defendant, a developer, for the purchase of the property. C

[10] In order to finance the purchase of the property, the second defendant took a loan from Malayan Banking Berhad (MBB) by entering into a loan agreement as well as executing a deed of assignment dated 13 December 1999 ('the assignment') in favour of MBB. Section 3.01 of the assignment states: D

> SECTION 3.01 ASSIGNMENT
>
> Pursuant to the Facility Agreement and for the consideration aforesaid, and as security for the payment and discharge of the Monies Hereby Secured, the Assignor as beneficial owner hereby assigns absolutely to the Bank all the present and future right title and interest and benefit of the Assignor in and to the Property, the Sale and Purchase Agreement and where appropriate the Related Agreements including where applicable, the equity of redemption therein together with the Assignor's right of enforcement thereof. E

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[11] The first defendant gave its consent to the assignment on 25 November 1999.

[12] The first defendant further gave a written undertaking to execute the memorandum of transfer of the property to the second defendant and to deliver the issue document of title in respect of the property to MBB free from encumbrances upon its issuance, once the Land Office had issued the title ('the undertaking'). G

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[13] With the consent and the undertaking being given, MBB disbursed the loan in full to the first defendant.

[14] Thereafter, some eight years later, that is, on 3 October 2007, the first defendant, by letter, informed MBB that the strata title for the property had been issued. I

[15] However, by the same letter — and this led to the dispute between the plaintiff and the first defendant — the first defendant also informed MBB that

it would only release the title to the property to MBB upon MBB making full payment of the outstanding maintenance charges, namely, the sum of RM27,835.25 due to the first defendant in respect of the property.

[16] The loan and the assignment were subsequently transferred to, and vested in, the plaintiff under s 50 of the Banking and Financial Institutions Act 1989 and pursuant to a High Court Vesting Order dated 17 April 2008 ('the Vesting Order').

[17] Two years later, on 28 October 2010, the second defendant was adjudicated a bankrupt.

[18] Around the same time, the second defendant defaulted on the loan. This led to the plaintiff exercising its rights under the vesting order and the assignment. The plaintiff proceeded to auction the property. The property was successfully sold at the auction to one Chan Ching Ai for RM113,000.

[19] At the same time, the plaintiff wrote to the first defendant for the release of the strata title in respect of the property to the plaintiff to enable the plaintiff to effect the transfer of the property to the successful bidder. But the first defendant informed the plaintiff that it would only release the strata title to the plaintiff upon the plaintiff settling the outstanding maintenance charges on the property in the sum of RM27,835.25.

[20] Be that as it may, the first defendant did execute the memorandum of transfer (Form 14A of the National Land Code) in favour of the second defendant and, by its letter of 14 March 2011, released the memorandum of transfer to the plaintiff.

[21] After numerous correspondences between the plaintiff and the first defendant, and the failure of the first defendant to deliver the strata title to the plaintiff as requested, the plaintiff filed the originating summons in the High Court for a declaration that the plaintiff was not liable to pay the outstanding maintenance charges claimed by the first defendant in respect of the property, and for a consequential order for the delivery of the strata title to the property by the first defendant to the plaintiff.

[22] The first defendant resisted the originating summons, and counter-claimed against the plaintiff for the outstanding maintenance charges in the sum of RM27,835.25.

[23] At the hearing of this appeal, the second defendant was not present. The senior federal counsel representing the Director General of Insolvency (appearing on behalf of the second defendant who is a bankrupt) is not opposing this appeal.

[24] It is the contention of the first defendant that the assignment passed on to the plaintiff not only the rights of the purchaser under the sale and purchase agreement but also the liabilities of the purchaser as well under the same, including the liability to pay the maintenance charges. The first defendant refers to cl 8(2) and cl 10 of the sale and purchase agreement. Clause 8(2) provides:

> 8 INFRASTRUCTURE AND MAINTENANCE
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> (1) ...
>
> (2) From the date the purchaser takes vacant possession of the said parcel until such time when it is taken over by the Appropriate Authority or the Management Corporation, as the case may be, the purchaser shall pay a fair and justifiable proportion of the costs and expenses incurred for the maintenance of the infrastructure.

[25] Clause 10 provides:

> 10 PAYMENT OF SERVICE CHARGES
>
> (1) The purchaser shall be liable for and shall pay the service charges for the maintenance of the common property and for the services provided by the Vendor prior to the establishment of a Management Corporation under the Strata Titles Act 1985.
>
> (2) From the date the purchaser takes vacant possession of the said parcel, the purchaser shall pay a fair and justifiable proportion of the costs and expenses reasonably incurred for the maintenance and management of the common property and for the services provided. Such amount payable shall be determined according to the provisional share units assigned to the said parcel by the Vendor's Architect. The purchaser shall pay one month's deposit and one month's advance in respect of the service charges and any payment thereafter shall be payable monthly in advance.

[26] The first defendant also relies on cl 3(2) of the sale and purchase agreement. The full provision of cl 3 states:

> 3 SEPARATE STRATA TITLE AND TRANSFER OF TITLE
>
> (1) The Vendor shall, at its own cost and expense, apply for subdivision of the said Building so as to obtain the issue of a separate strata title to the said parcel under the Strata Titles Act 1985 from the Appropriate Authority.
>
> (2) Upon the issuance of the strata title to the said parcel and subject to the payment of the purchase price by the purchaser to the Vendor in accordance with Clause 4(1) and the observance of all the terms and conditions herein provided, the Vendor shall, within twenty-one (21) days, execute a valid and registrable Memorandum of

Transfer of the said Parcel to the purchaser or if and where the law permits, his heir or nominee or lawful assign, as the case may be.

(3) Upon full payment of the Purchase Price together with all interest calculated in accordance with Clause 7 hereof, if any, by the purchaser, the Vendor shall do everything necessary to transfer the said Parcel or cause to procure the same to be transferred to the purchaser.

THE DECISION OF THE HIGH COURT JUDGE

[27] In dismissing the plaintiff's claim, and allowing the first defendant's counterclaim, the learned High Court judge ruled:

[11] By reference to section 6.02 of the Assignment, it would appear that the proceeds of the sale of the subject property should be utilized to settle various payments including 'all fees, dues, cost, rents, rates, taxes and other outgoings on the property'. Service and Maintenance Charges can be considered as outgoings on the subject property.

[12] By virtue of what is expressly stated in s. 5.01 of the Assignment, I agree with the contention of D1 that as such P shall be liable to comply with Clauses 8(2) and 10 of the SPA since the provision of the services and maintenance was for the benefit of the subject property in which the Second Defendant was merely a licensee. The provisions were meant for the preservation of the subject property and accordingly, it was in line with the principles of equity that P took the rights, interests and benefits therein under the SPA and Assignment subject to the settlement of arrears of service and maintenance charges. In a similar vein, it would be in breach of principles of equity if the sale proceeds of the auctioned property was not utilized to defray these charges which were for the benefit and enjoyment of the subject property ...

[28] As the above paragraphs of the judgment of the learned High Court judge refer to sections 5.01 and 6.02 of the assignment, I shall set out the provisions of these two sections and they are as follows:

SECTION 5.01 LICENCE

Notwithstanding anything contained in this Assignment it is hereby declared that the Assignor shall during the continuance of this Assignment retain possession of the Property as licensee of the Bank and by no other right and within seven (7) days after his licence to occupy the Property is terminated in the manner hereinafter provided, he shall give immediate vacant possession of the Property to the Bank.

...

SECTION 6.02 DEFICIENCY IN PROCEEDS OF SALE

Notwithstanding any provision herein, the Assignor hereby expressly agrees that if the amount realised by the Bank from the sale of the Property under the provisions of the Security Documents after deduction and payment from the proceeds of such sale of all fees dues costs rents rates taxes and other outgoings on the Property is less than the amount due to the Bank and whether at such sale the Bank is the purchaser

or otherwise the Assignor shall pay to the Bank the difference between the amount due and the amount so realised and until payment the Assignor shall also pay interest on such balance at the Prescribed Rate together with the Default Margin.

[29] With respect, we are not able to agree with the above reasoning of the learned High Court judge. We are not pursuaded with the learned judge's reasoning based on some 'principles of equity'. We find section 5.01 to be of no relevance at all. Although we agree with the learned judge that the words 'other outgoings' in section 6.02 would include maintenance charges, the section only confers on the plaintiff the right to utilise the proceeds of the sale of the property for paying the maintenance charges: it does not impose on the plaintiff the obligation to do so.

[30] We, therefore, take the position that the learned High Court judge, with respect, had erred in his decision. However, we have other reasons for our view.

[31] We have carefully examined the provisions of the assignment. Having done so, we hold that under the assignment the liability to pay any maintenance charges still remains with the second defendant. Section 3.01 of the assignment states that the second defendant as the purchaser cum assignor assigns to MBB 'all the present and future right title and interest and benefit of the assignor in and to the property.' This means that what have been assigned to the plaintiff are only the 'right title interest and benefit' in respect of the property. There has been no assignment of the liabilities in respect of the property to the plaintiff. This means that the liability to pay the maintenance charges is still that of the purchaser (that is, the second defendant). Therefore, it is to the purchaser (the second defendant) that the demand for the payment of the outstanding maintenance charges should be made (but now subject to the appropriate legal procedure pertaining to bankruptcy).

[32] In our judgment, cl 3(2) of the sale and purchase agreement (the clause relied upon by the first defendant) must be read with cl 3(3) of the same. Now, under cl 3(3) the right of the purchaser under the sale and purchase agreement, in particular under cl 3(2), is to have the title to the property passed on to the purchaser upon payment of the full purchase price. Clause 3(3) does not make it a condition that the purchaser must first settle any maintenance charges due before the purchaser is entitled to have the title transferred to her. This right of the purchaser under cl 3(3) to have the title transferred to her is transferred on to MBB (and, thereafter, to the plaintiff) by reason of section 3.01 of the assignment.

[33] In this regard it is pertinent to recall what was said by Mohamed Dzaiddin J (as he then was) in *Chung Khiaw Bank Ltd v Penang Garden Sdn*

Bhd [1990] 1 CLJ (Rep) 748 at pp 750–751:

> First, in an assignment of a contract it is an accepted principle that the burden or liability cannot be transferred so as to discharge the original contractor without the consent of the other party because no one is obliged without his consent to accept the liability of a person other than him with whom he made his contract. See *Chitty on Contract* Vol 1, 25th Ed, para 1309.
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> ...
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> On the interpretation of the crucial clause in the said assignment, in my opinion, the words 'right, interest and title' in the said property were never intended to include the liability of the purchaser. First, if it was the intention of the assignor to pass his liability under the agreement to the plaintiff, the solicitors would have included the word 'liability' without much fuss or difficulty. In fact, the express mention of the aforesaid words show a clear intention to exclude the assignor's liability under the agreement.

[34] That only the rights of the assignor are transferred under an assignment and not the obligations and liabilities of the assignor was stressed by the High Court in *Hong Leong Bank Berhad (which has taken over all assets and liabilities of Hong Leong Finance Bhd) v Sum-Projects (Bros) Sdn Bhd* [2010] 7 MLJ 39 where the court held (at p 55 para 28):

> [28] As adverted to above, the purchasers remain responsible and liable for the obligations under the SPA. What was assigned to the plaintiff under the deed of assignment is the benefit of the SPA, viz, the rights, titles and interest of the SPA and the property. The purchasers have undertaken to continue to discharge the burdens of it, viz, the conditions, covenants and stipulations of the SPA. The plaintiff, notwithstanding that it is not an original party to the SPA can take the benefits without the burden of the SPA. This intention is clearly reflected in section 7.01 of the deed of assignment between the purchasers as (assignors) and the plaintiff (as assignee) to which the consent of the defendant is endorsed therein.

[35] This legal position that in an assignment only rights and not liabilities are assigned was reiterated recently by the Court of Appeal in *Hong Leong Bank Bhd v Tan Siew Nam & Anor* [2014] 5 MLJ 34; [2014] 1 LNS 458, para 55–56.

[36] Moreover, in the present case, there is section 4.01 of the assignment that states that the second defendant, as the assignor, covenants and undertakes with MBB to 'punctually pay all quit rent, rates, taxes and all outgoings payable in connection with or arising out of the property'. The full provision of section 4.01 of the assignment reads:

> Section 4.01 COVENANTS IN RESPECT OF LAND
>
> The Assignor further covenants and undertakes with the Bank that during the continuance of this assignment to:

(a) punctually pay all quit rent, rates, taxes and all outgoings payable in connection with or arising out of the Property or of the Assignor's business and obtain all necessary licenses and comply with all regulations relating to the carrying on of such business and the Assignor shall produce to the Bank the receipts for all such payments as aforesaid. In the event of the Assignor failing to pay any money herein covenanted to be paid, it shall be lawful for but not obligatory upon the Bank to pay the same or any part thereof and all moneys expended by the Bank together with interest thereon at the Prescribed Rate from the date of such payments by the Bank shall be recoverable from the Assignor and shall be paid on demand being made by the Bank.

[37] Thus, the assignment has clearly provided that the second defendant continues to pay 'all outgoings' in respect of the property. In our view, the liability to pay the maintenance charges is covered by the words 'all outgoings'. This reinforces the plaintiff's submission that the liability to pay the maintenance charges remains with the assignor/second defendant, and is not transferred to the assignee/MBB.

[38] We further hold that the refusal by the first defendant to deliver up the strata title to the plaintiff amounts to a breach of the former's undertaking given pursuant to its consent to the assignment. The first defendant had given its undertaking to execute all necessary instruments and agreements and to obtain the necessary consent to transfer the property to the second defendant and to deliver the issue document of title to the property free from all encumbrances to MBB (thereafter the plaintiff) upon issuance of the same. No qualification was attached to the said undertaking. The undertaking reads:

I/We, of BINABAIK SDN BHD (Co. No. 170758-A) of Jalan Mewah Ria 2/1, Taman Bukit Mewah, 81200 Johor Bahru being the developer and the proprietor (if applicable) of the property do hereby consent to the foregoing Assignment and the same has been noted in our records. I/We further undertake to execute all such instruments and agreements and obtain such consent as may be necessary to transfer to the Assignor the title to the Property. Unless otherwise instructed by the Bank in writing, I/We shall deliver the issue document of title to the Property free from all encumbrances to the Bank upon issuance of the same together with a valid and registrable memorandum of transfer in favour of the Assignor.

[39] Hence, to allow the first defendant to claim the purported outstanding owing by the second defendant from the plaintiff by holding on to the strata title to the property is tantamount to allowing the first defendant to renege on its own undertaking.

[40] It is our judgment in the present case that, as submitted by learned counsel for the plaintiff, the first defendant is only a bare trustee of the property and no longer holds any beneficial interest in the property by reason of:

A (a) the full purchase price of the property having been paid; and

(b) the first defendant having delivered to the appellant the memorandum of transfer of the property duly executed.

B **[41]** In *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 at p 483 ; [1990] 1 CLJ (Rep) 49 at p 51, the Supreme Court held (at p 51):

> In Peninsular Malaysia the law is clear, viz the vendors after receipt of the full purchase price and surrender of possession of the lands to the purchasers are deemed C to be bare trustees for the purchasers (see *Temenggong Securities Ltd & Anor v Registrar of Titles, Johor & Ors* [1974] 2 MLJ 45).

[42] Therefore, it is the first defendant's obligation to deliver the strata title D as requested by the plaintiff as ruled in *Director General of Inland Revenue v Ooi Guan Hoe* [1986] 2 MLJ 385 where Mohamed Dzaiddin J (as he then was) at p 388 quoted *Halsbury's Law of England* (4th Ed) Vol 48 para 641:

> A bare trustee is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of E it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so.

[43] In our judgment, based on the facts and the law, there is no excuse F whatsoever for the first defendant to refuse to deliver up the strata title for the purposes of having the name of the successful bidder registered in the title. We reject the first defendant's argument that it has a lien over the property, as in our view the argument is devoid of any merit.

G **[44]** Finally, we wish to add that for the first defendant to hold back on the strata title to the property would amount to contravening s 40A of the Strata Titles Act 1985. This section states:

> 40A Transfer of ownership of strata titles
>
> H (1) Any original proprietor or any person or body appointed by a court of competent jurisdiction shall execute the transfer of strata titles to the parcel proprietors within twelve months from the date of issue of strata titles by the Land Administrator or any extended period approved by the Director upon the opening of the Strata register.
>
> I (2) Any purchaser shall execute complete documents of transfer of strata titles within twelve months or any extended period approved by the Director from the date of notice of transfer of strata titles issued by the original proprietor or from the date of purchase of the parcel, whichever is the later.

(3) Any original proprietor or any person or body appointed by a court of competent jurisdiction or any purchaser who fails to comply with subsection (1) or (2) shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than one thousand ringgit and not more than ten thousand ringgit per parcel.

[45] The above section clearly imposes a legal obligation upon the first defendant to execute the transfer of the strata title to the purchaser within 12 months from the date of its issuance; and the refusal to do so is an offence under the Act. The 12 month period has clearly long passed since the time the first defendant informed MBB of its issuance in its letter of 3 October 2007.

[46] In conclusion we hold:

(a) that the plaintiff is under no legal obligation under the assignment and the sale and purchase agreement to pay the outstanding maintenance charges; and

(b) that the first defendant is under a legal obligation to deliver the title in respect of the property to the plaintiff.

[47] Accordingly, we allow the appeal with costs.

[48] We grant the prayers (i), (ii), (iii) and (v) of the originating summons (but the period of 7 days in prayer (ii) increased to 30 days).

Appeal allowed with costs.

Reported by Afiq Mohamad Noor